TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 766

M. J. DUGAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

FILED FEBRUARY 14, 1928

(33,218)

(33,218)

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[fols. 1-7] **IN SUPREME COURT OF OHIO**

No. 20537

M. J. DUGAN, Plaintiff in Error,

vs.

STATE OF OHIO, Defendant in Error

WRIT OF ERROR—Filed January 18, 1928

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said state in which decision could be had in the said suit between M. J. Dugan and the State of Ohio, wherein was drawn in question the exercise of jurisdiction by the Mayor's Court of the City of Xenia, Ohio, on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto and said decision was in favor of such, its validity, a manifest error has happened, to the great damage of the said M. J. Dugan as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same to the Supreme Court of the United States, together with [fols. 8 & 9] this writ, so that you have the same at Washington on the 7 day of February, 1928, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and

according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 18 day of January, in the year of Our Lord, 1928.

H. F. Rabe, Clerk of the United States District Court for the Southern District of Ohio Western Division, by C. P. White, Jr., Deputy. (Seal United States District Court, Southern Dis. Ohio.)

Allowed by: Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fols. 10-17] IN SUPREME COURT OF OHIO

[Title omitted]

AGREED STATEMENT OF FACTS—Filed January 18, 1928

It is hereby agreed between M. J. Dugan, plaintiff in error herein and the State of Ohio, defendant in error herein, that the following statement is an agreed statement of facts in said case as presented to and considered by the Supreme Court of Ohio:

1st. The City of Xenia is a Charter city.

2nd. As such Charter city it has a commission form of government, with five commissioners.

3rd. The Charter of the City of Xenia provides that a member of the city commission shall also be mayor of the city of Xenia.

4th. The said mayor of the city of Xenia has no executive authority and exercises only judicial authority.

5th. The city commission exercises all legislative powers and the commission together with the Manager exercises all executive powers of the city

6th. The mayor of the city of Xenia is compensated only by a fixed salary and receives no fees for his services. Said salary is fixed by the votes of the members of the

commission other than the mayor, he having no vote therein. He receives no fees for services as a judicial officer and receives no fees or other compensation as mayor except his fixed salary as above stated.

7th. The offense charged in this case against the plaintiff in error herein was an offense committed within the corporate limits of the city of Xenia.

M. J. Dugan, by F. L. Johnson, His Atty. J. A. Finney, Atty. for Deft. in Error.

[fol. 18] IN SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

June 22.—Motion for an order directing the court of appeals of Greene County to Certify its record allowed.

Journal 31, page 138.

June 22, 1927.—It is ordered by the Court that this motion be, and the same hereby is, allowed.

Journal 31, page 138.

December 21, 1927.—The cause came on to be heard upon the transcript of the record of the Court of Appeals of Greene County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—. Ordered, That a special mandate be sent to the Court of Common Pleas of Greene county, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Green County, "for entry."

Journal 31 page 234.

[fols. 18a & 18-1] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed July 2, 1927

Now comes the plaintiff in error herein, and says that heretofore he was convicted before the mayor's court of the city of Xenia, Green county, Ohio, for the unlawful possession of intoxicating liquor; said conviction was sustained by the Common Pleas Court of Greene county, Ohio, and that sustained by the Court of Appeals of Greene county, Ohio, on April 16, 1927, as shown by certified transcript and bill of exceptions which is hereto attached and made a part hereof.

There was error in said proceedings in this, to-wit:

1. The mayor's court erred in overruling an objection made in said case before any testimony was taken, raising the question of the jurisdiction of the mayor of the city [fol 18-2 & 3] of Xenia to try said case, and excepted to at the time by the plaintiff in error herein, defendant below, plaintiff in error herein, defendant below, being by the overruling of said objection deprived of the right to a fair trial as guaranteed him by the Constitution.

2. Other errors of law, fact and practice, apparent upon the fact of the record.

Wherefore, plaintiff in error prays that the holding and judgment of the lower court be reversed, and set aside, and that he be restored to all things that he has lost by reason thereof.

Frank L. Johnson, Attorney for Plaintiff in Error.

WAIVER

Service of summons is hereby waived, and appearance of the state of Ohio entered.

J. A. Finney, City Solicitor, City of Xenia, Greene County, Ohio.

[fols. 18-4] IN COURT OF APPEALS OF GREENE COUNTY

JUDGMENT

1927, April 16.—The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said M. J. Dugan, plaintiff in error herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Greene county, Ohio, filed therewith in the said cause wherein M. J. Dugan was plaintiff in error, and the State of Ohio was defendant in error, mentioned and referred to in said petition in error, and was argued by counsel: Upon consideration whereof the court finds that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said Court of Common Pleas, in said cause, in favor of the said defendant in error, and against the said plaintiff in error be, and the same are hereby in all things affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

[fol. 18-5-7] It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $. —, and in default thereof that execution issue therefor.

Ordered, that a special mandate be sent to the Court of Common Pleas of Greene county, to carry this judgment into execution.

To all which plaintiff in error ecepts.

[Duly certified.]

[fol. 18-8] IN COURT OF COMMON PLEAS OF GREENE COUNTY

JUDGMENT

1927, February 1.—The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said M. J. Dugan, plaintiff in error

herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the mayor's court of Xenia, Greene county, Ohio, filed therewith in the said cause wherein state of Ohio was plaintiff and M. J. Dugan defendant, mentioned and referred to in said petition in error, and was argued by counsel.

Upon consideration whereof the court finds that there is no error manifest upon the face of the record in said orders and judgment of said mayor's court.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said mayor's court in said cause in favor of the said defendant in error, and against the said plaintiff in error be, and the same are hereby in all things affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed [fol. 18-9] at $ —, and in default thereof, that execution issue therefor.

To which action plaintiff in error excepts.

Ordered, that a special mandate be sent to the mayor's court of Xenia, Greene county, to carry this judgment into execution.

[Duly certified.]

[fols. 18-10 & 11] IN MAYOR'S COURT OF XENIA, OHIO

THE STATE OF OHIO, CITY OF XENIA,

vs.

M. J. DUGAN

AFFIDAVIT FOR WARRANT

STATE OF OHIO,
Greene County,
City of Xenia, ss:

Before me, John W. Prugh, mayor of the city of Xenia, personally came M. E. Graham, who being duly sworn according to law, deposeth and saith that M. J. Dugan,

late of the city of Xenia, in the county aforesaid, on or about the twenty-seventh day of November in the year of our Lord, one thousand nine hundred and twenty-six, in the city of Xenia, in the county of Greene, and state of Ohio, aforesaid, did then and there possess intoxicating liquors, that the possessing of intoxicating liquors as aforesaid by the said M. J. Dugan was then and there prohibited and contrary to Section 6212-15 of the General Code and against the peace and dignity of the state of Ohio.

Signed, M. E. Graham.

Sworn to and subscribed before me by the said M. E. Graham in the city and county aforesaid, this twenty-seventh day of November in the year of our Lord, one thousand nine hundred and twenty-six.

John W. Prugh, Mayor of the City of Xenia, Ohio.
(Seal.)

[fols. 18-12-59] In Mayor's Court of Xenia, Ohio

JUDGMENT

M. J. Dugan, having been before me, mayor of the city of Xenia, Ohio, on the twenty-seventh day of November, 1926, to answer to the charge set out in affidavit herein and having pleaded not guilty, I set his hearing for 12/2/26 at 9 o'clock a. m. and fixed his bond at $1000.00 which he gave signed by himself and Frank Johnson. Bond approved 12/2/26. 9 a. m. o'clock case continued to 12/3/26 at one p. m. 12/3/26, one o'clock p. m., this case came on for hearing. After hearing the evidence submitted and the acknowledgment of the defendant himself, of knowledge of illegal liquor on the premises for two years, I find the defendant guilty as charged. 12/3/26. Motion new trial filed. 12/8/26. Motion overruled. Motion in arrest of judgment filed. Motion allowed. I sentence the defendant to pay a fine of $1000.00 and the costs of prosecution, $27.80. Bill of exceptions allowed and filed. Original bond, $1000.00 continued. Case appealed to Common Pleas Court.

[Duly certified.]

[fol. 19] IN SUPREME COURT OF OHIO

DUGAN

v.

THE STATE OF OHIO

Municipal corporations—Mayor not disqualified from trying intoxicating liquor prosecution—Mayor a salaried officer, receiving no costs or other compensation.

(No. 20537—Decided December 21, 1927.)

Error to the Court of Appeals of Greene County

Mr. Frank L. Johnson, for plaintiff in error.
Mr. J. A. Finney, a city solicitor, for defendant in error.

OPINION

By the Court: M. J. Dugan was arrested upon a charge of unlawful possession of intoxicating liquors, and arraigned and tried before the mayor of the city of Xenia, the county seat of Greene county, Ohio. Before any evidence was introduced, the defendant orally objected to the introduction of any evidence, for the reason that the mayor was without jurisdiction to hear and determine the issues in the case. No specific grounds of want of jurisdiction were urged. The objection being overruled, the case proceeded to trial, and the defendant was found guilty, and a fine was assessed. Error was thereupon prosecuted to the Common Pleas Court where the judgment was affirmed, and, upon error further prosecuted to the Court of Appeals, the judgments in the common pleas and the mayor's court were affirmed. The case was heard in the Court of Appeals on April 16, 1927, and thereupon, for the first time, it was urged that the mayor was disqualified on the grounds of the decision in the case of Tumey v. State, 273 U. S. 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The mayor of Xenia is a salaried officer, and does not participate in the costs collected in misdemeanor cases. All such costs are paid into the funds of the city of Xenia. It does not appear in this record that the court of the

mayor of the city of Xenia has any of the features referred to in the opinion of the United States Supreme Court in the Tumey case, whereby the cause of justice was commercialized, and it further appears that the offense for which Dugan was tried was committed within the limits of the city of Xenia. The amount of fines collected annually on convictions before the mayor of Xenia in liquor cases does not appear. It is insisted that, even though the mayor was a salaried officer, this case comes within the second of the conditions referred to by the Supreme Court in the Tumey case, viz., that the mayor had in mind the financial needs of the city. Upon this point the Court of Appeals, in affirming the conviction, said:

"This reference, however, was in our judgment incidental, and did not of itself amount to a disqualification of the mayor, but was a circumstance which accentuated the [fols. 20-23] personal interest of the mayor under the scheme provided by the so-called Crabbe Act. To hold that the mayor of a city is disqualified merely becauses fines are paid into the city treasury would break down the legitimate functions of the noncommercialized courts of the state. To so construe the decision of Judge Taft would affect the jurisdiction, not only of mayors operating upon a fixed salary, but municipal court judges, and might even extend to the common pleas and probate judges where the fines are paid into the county treasury. We are clear that this interpretation is not justified by the decision of the Supreme Court of the United States in the Tumey case."

To these pertinent comments we may add that, if we should adopt the arguments of counsel for accused persons in the cases recently submitted, it would result that a common pleas judge would be disqualified to sit in judgment upon a very large number of cases in the county of his residence, and in which he pays taxes, where taxes, assessments, licenses, and franchises are involved, and where general property rights common to all property owners, including the judge, are involved. In all such cases it would be necessary to obtain a judge from another judicial district. In any such case prejudice would be conclusively presumed, and the prejudiced party could submit to trial without objection or question, and, if the decision be favorable, he could claim the benefit of res adjudicata, and,

if unfavorable, could then plead it as null and void, declaring the court to be without jurisdiction of the subject-matter, and enjoin its enforcement in a collateral attack without even resorting to the inconvenience and expense of an error proceeding. We agree with the Court of Appeals that this feature of the case was icidental only, and was intended to apply to those courts which were shown to be commercialized and should not be made to apply to a mayor compensated by a fixed annual salary, and receiving no part of the assessed costs, who is conducting a court in the trial of misdemeanors committed within the confines of his own city or village.

For the resons stated, the judgment of the Court of Appeals in this case will be affirmed.

Judgment affirmed.

Marshall, C. J., Day, Allen, Robinson and Matthias, JJ., concur.

Jones, J., concurs in the judgment.

[fol. 24] IN SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed February 28, 1928

We do hereby designate the following portions of the Record filed in the Supreme Court of the United States to be printed by the Clerk of the Supreme Court of the United States:

1. Affidavit for arrest before Mayor.
2. Judgment entry and costs before Mayor.
3. Entry of affirmance before Common Pleas Court.
4. Entry of affirmance in the Court of Appeals.
5. Transcript in the Supreme Court showing judgment on motion to certify, and petition in error.
6. Agreed statement of facts.
7. The following parts of the Bill of Exceptions:

Thereupon, before any testimony of witnesses was heard, the defendant objected to the introduction of any

evidence in the case, for the reason that no search warrant was issued for the premises, where the liquor was found.

Which objection was overruled.

To which ruling of the court, the defendant excepted.

And, thereupon the defendant objected to the jurisdiction of the court, and objected to the court hearing any evidence in the case, on the ground that he is without jurisdiction to hear and determine the issues in this case.

Which objection was overruled.

To which ruling of the court, the defendant excepted.

Robert F. Cogswell, F. L. Johnson, Attorneys for Plaintiff in Error.

[fol. 25] Service of above designation of parts of Record to be printed, and receipt of copy of points to be made by plaintiff in error in the Supreme Court, are hereby acknowledged, and it is stipulated and agreed that should either side desire to refer to parts of the Record not printed, it may do so without objection.

—— —— Attorney for Plaintiff in Error. J. A. Finney, Attorney for Defendant in Error.

[Endorsed:] Supreme Court of the United States. M. J. Dugan, Plaintiff in Error, vs. The State of Ohio, Defendant in Error. Designation of Parts of the Record to be Printed.

[fol. 26] Statement of Points on Which the Plaintiff in Error Intends to Rely

Plaintiff in Error was convicted in the Mayor's Court of the City of Xenia, Greene County, Ohio, and fined $1,000.00 for the unlawful possession of intoxicating liquor in violation of the statutes of Ohio. M. J. Dugan objected to going to trial before the Mayor's Court of the said city of Xenia, Ohio, on the ground that the Court was without jurisdiction to hear said case. He was convicted and said conviction sustained by the Common Pleas Court of Greene County, Ohio, and the Court of Appeals of said district and the State Supreme Court.

Following are the points raised by the Record, Agreed Statement of Facts and the Bill of Exceptions on which the Plaintiff in Error relies:

I

A conviction of a defendant by a Mayor of a city in Ohio, as set forth in the Agreed Statement of Facts herewith filed, is a denial of due process of law in violation of the Fourteenth Amendment to the Federal Constitution, in this, to wit:

[fols. 27 & 28] (1) That the Mayor is also a member of the City Commission under the City Charter, and by reason thereof occupies two practically and seriously inconsistent positions, one partisan and the other judicial; and by reason thereof, necessarily involves a lack of due process of law in the trial of defendants charged with crime before him.

(2) That as such Mayor he had a right to fine persons convicted of the offence of the possession of intoxicating liquor in the sum of $100.00 to $1,000.00 for the first offence, and from $300.00 to $2,000.00 for the second offence, and that half of said fines assessed were paid into the City Treasury; by reason of Section 6212—19 General Code of Ohio; and as a member of the City Commission, the Mayor had a right to vote on the appropriation and spending of said money, and therefore was financially interested as Mayor in the outcome of all such cases brought before him.

(3) That while the Mayor receives only a fixed salary and does not receive any fees, yet all the fees taxed and collected by said Mayor under the City Charter are paid into the City Treasury and credited to the fund out of which the salary of said Mayor is payable.

F. L. Johnson, Robert F. Cogswell, Attorneys for Plaintiff in Error.

[fol. 29] [File endorsement omitted.]

[fol. 30] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED
Filed March 3, 1928

We hereby designate the following portions of the record filed in the Supreme Court of the United States to be printed by the Clerk, in addition to that part of the record designated by the plaintiff in error, to-wit:

The following part of the bill of exceptions appearing on Page 44:

(Cross-examination of M. J. Dugan, Plaintiff.)

"Q. It was in February 1924, when you were arrested and plead guilty of possessing intoxicating liquor, and were fined $400.00.

A. That is right."

J. A. Finney, Attorney for Defendant in Error.

[fol. 31] [File endorsement omitted.]

Endorsed on cover: File No. 33,218: Ohio Supreme Court. Term No. 766. M. J. Dugan, plaintiff in error, vs. The State of Ohio. Filed February 14th, 1928. File No. 33,218.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 766.

M. J. DUGAN, *Plaintiff in Error,*

vs.

THE STATE OF OHIO, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE AND GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

This case comes to the Supreme Court of the United States on a writ of error (R., 1) in which the Supreme Court of the United States is asked to reverse the judgment of the Supreme Court of Ohio, rendered December 21, 1927. (R., 3.) The Supreme Court of Ohio in that case affirmed the judgment of the Court of Appeals of Greene County, Ohio (R., 5), which had affirmed the Common Pleas Court of Greene County, Ohio (R., 5), which in its turn had affirmed the conviction and fine in the Mayor's Court of the City of Xenia, Greene County, Ohio (R., 7), against the plaintiff in error herein, defendant below, M. J. Dugan, who was in that Court convicted for the unlawful possession of intoxicating liquor. The plaintiff in error, who at the trial was the defendant, claimed at the trial and in the appellate courts (R., 4) that the Mayor of the City of Xenia was with-

out jurisdiction to try him, and it was urged in the appellate courts that the exercise of said jurisdiction was in violation of the Fourteenth Amendment to the Constitution of the United States. (R., 4.) This claim was denied. Jurisdiction of this Court is invoked under Section 237-a of the Judicial Code, as amended by the Act of February 13, 1925. The case of *Edward Tumey, plaintiff in error* v. *The State of Ohio, defendant in error*, 273 U. S. 510, is cited in support of the jurisdiction of this Court.

SPECIFICATIONS OF ASSIGNED ERRORS.

1. The Supreme Court of the State of Ohio erred to the prejudice of the plaintiff in error in not holding unconstitutional and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, the trial before, and the exercise of jurisdiction, and judgment by the Mayor's Court of the said City of Xenia, Greene County, Ohio, in that the said Mayor was a member of the City Commission of the City of Xenia, Greene County, Ohio, by reason of the Charter of said City of Xenia, and in his capacity as judge had the discretion of imposing fines for a first offense from One Hundred Dollars to One Thousand Dollars, and for a second offense from Three Hundred Dollars to Two Thousand Dollars, by virtue of Section 6212-17 of the General Code of Ohio; that this wide discretion was necessarily affected by the interest of the Mayor as a member of the City Commission of the said City of Xenia, whose necessities or cupidity would lead the mayor to impose large fines for that reason rather than the consideration of justice to the citizens, by and through which trial, exercise of jurisdiction, and judgment, the State of Ohio deprived the plaintiff in error of liberty and property without due process of law.

2. The Supreme Court of the State of Ohio, erred to the prejudice of the plaintiff in error in holding that the judgment of the Court of Appeals of Greene County, Ohio,

which affirmed the judgment of the Common Please Court of Greene County, Ohio, which had affirmed the judgment of the Mayor's Court of Xenia, Ohio, did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, by depriving the plaintff in error of liberty and property without due process of law. (R., 8.)

STATEMENT OF FACTS.

Plaintiff in error, M. J. Dugan, a resident of Xenia, Greene County, Ohio, was arrested for the unlawful possession of intoxicating liquor on an affidavit filed in the Mayor's Court of the City of Xenia, Ohio. (R., 6.) Before any evidence was introduced in the case the plaintiff in error herein objected to being tried by said Mayor, which objection was overruled and exception duly noted. Upon trial of the case the said M. J. Dugan was found guilty and was fined the maximum amount under the statute, to wit: One Thousand Dollars. (R., 7.)

Error was prosecuted to the Common Pleas Court of Greene County, Ohio, which affirmed the finding of the Mayor's Court (R., 5), which finding was later on affirmed by both the Court of Appeals (R., 5) and the Supreme Court of the State of Ohio. (R., 4.)

The City of Xenia is a Charter City under the constitution and laws of that State to-wit Article XVIII, Sec. 7, 8 and 9, Ohio Constitution, and has what is known as a commission manager form of government. In other words, the old system of mayor and council is done away with, and it now has a City Manager and a City Commission, which consists of five members elected by the citizens of said City. The executive authority of the city is in the City Manager and the City Commission, and the legislative authority is in the City Commission alone. The judicial authority in misdemeanor cases is placed in the hands of one of the members of the City Commission designated by the other

members and called Mayor. As such Mayor he has no executive authority but his being mayor does not deprive him of his share of the legislative and executive authority as a member of the City Commission. He is on a salary and receives no fees, but all fees that are collected in cases where the defendant is convicted are paid into the fund out of which the salary of the Mayor is paid. Half of the money collected in fines in cases for violation of the liquor laws is paid into the State Treasury and half is paid into the City Treasury, *and as a member of the City Commission the Mayor has a right to vote on the spending of this money raised by the imposition of said fines.* (R., 12.) The Mayor in this case acted under the following sections of the General Code of Ohio, and Section 8 of the Charter of the City of Xenia, Ohio:

Section 6212-15:

> "No person shall after the passage of this act manufacture . . . possess . . . any intoxicating liquors . . ."

Section 6212-17:

> ". . . any person who violates the provisions of this act (General Code, Sections 6212-13 to 6212-20) for a first offense shall be fined not less than one hundred dollars nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense he shall be fined not less than five hundred dollars nor more than two thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years. . . ."

Section 6212-18:

> "Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of

any of the provisions of this act (G. C. Sections 6212-13 to 6212-20); when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided. And in any such cases where imprisonment is not a part of the penalty, the defendant can not waive examination nor can said mayor, justice of the peace, or judge recognize such defendant to the grand jury; nor shall it be necessary that any information be filed by the prosecuting attorney or any indictment be found by the grand jury."

Section 6212-19:

"Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

Section 8 of the Charter of Xenia, Ohio:

"The Commission shall designate by a majority vote one of its number to act as Mayor of the city who shall exercise all the judicial functions of a Mayor under the general laws of the state and who shall use the title of 'Mayor' in any case in which the execution of legal instruments of writing or other necessity arising from, and which the general law of the state so requires, but this shall not be construed as conferring upon him the veto power or the administrative functions of a Mayor under the general laws of the State. He shall receive such additional compensation to that received as Commissioner as the Commission shall by ordinance determine, upon the affirmative vote of three members thereof, exclusive of his own, and shall hold said office

at its pleasure. Such Mayor shall give bond in an amount as fixed by the Commission. The fees taxed and collected by said Mayor shall be paid into the City Treasury and credited to the fund out of which the salary of said Mayor shall be payable."

It should be noted that by virtue of Section 6212-18 the Mayor had jurisdiction over offenses committed outside of the city of Xenia, although as a matter of fact in this particular case M. J. Dugan was a resident of the city of Xenia.

It will also be noticed that the Mayor is also a member of the City Commission under the City Charter and that by reason thereof occupied two practically and seriously inconsistent positions, one partisan and the other judicial. (R., 12.)

ARGUMENT.

We claim that under the above state of facts the Mayor of the City of Xenia, Ohio, was financially interested, not as an individual, but as a member of the City Commission, in the fine imposed in this case, and all others of a like nature. The Mayor had a wide discretion under Section 6212-17, General Code of Ohio, in the imposition of fines, ranging for a first offense from One Hundred Dollars to One Thousand Dollars, and for a second offense from Three Hundred Dollars to Two Thousand Dollars. The necessities of the City made it necessary for the City Commission to raise a certain amount of money each year for the expenses of said City, and therefore the Mayor as a member of said City Commission was interested in the raising of these funds, and a finding of "guilty" and a large fine meant more money for the City Treasury, while a finding of "not guilty", meant less money for the City and more taxes for the said City and less money for him as a member of the City Commission to spend. A finding of "guilty" meant something in a financial way to the city, and as a

member of the City Commission of said City, the Mayor was interested in raising as much as he could for his city. In other words, he occupied two positions, one partisan and the other judicial. They were seriously inconsistent with each other. In the one instance as a member of the City Commission he was supposed to represent the interests of the City of Xenia, and did everything that he could for its best interests in a financial way. In the judicial position he would first be supposed to look to the question of the guilt of the defendant. These two positions were seriously inconsistent, and by reason thereof necessarily involved a lack of due process of law in the trial of defendants charged with crime before him.

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him, not to hold the balance nice, clean and true between the State and the accused denies the latter due process of law." *Tumey* v. *Ohio, supra.*

As a member of the City Commission of the City of Xenia the Mayor was charged with the business of looking after the finances of the City. If he was interested in looking after the finances of the City, how could he be fair and impartial in the finding in this case against the defendant?

Any financial interest of a court in its decision constitutes that court an unfair and impartial tribunal within the prohibition of the Fourteenth Amendment.

The proposition contended for is that compelling a trial before a court which is financially interested in the result of its decision is a denial of due process of law and it seems that reference need only be made to the decision which this Court rendered in the case of *Edward Tumey* v. *The State of Ohio,* 273 U. S. 510, to substantiate this claim. It is not necessary that the Court have a direct personal interest in the outcome of the case. It is sufficient to disqualify him

if he has any interest, whether that interest be great or small or whether it be personal or official interest, and we cite the Court to the following cases, to-wit:

Pierson v. *Atwood,* 13 Mass. 324, holds that any money interest, however small, deprives a litigant of a fair trial.

Gregory v. *Railroad,* 4 O. S. 675, held that where one of the judges had an interest in a corporation which was in litigation before him, the judge was disqualified.

State v. *Young,* 31 Fla. 594, 19 L. R. A., 636, holds that where a probate judge, who was a vestryman in a church which was a beneficiary under a will could not act as judge, and the Court said: "That the interest may not be beneficial pecuniarily to the individual wardens or vestrymen, does not make it any the less a property interest."

Dimes v. *Grand Junction Canal,* 3 H. L. 759. This is a leading English case. In a certain litigation the Lord Chancellor had an interest as a shareholder in a company which was a party, although the case was heard by the Vice-Chancellor whose decision was affirmed by the Chancellor, it was held that the Chancellor was disqualified. Lord Campbell said: "This will be a lesson to all inferior tribunals to take care not only that in their decress they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

Moses v. *Julian,* 45 N. H. 52, 84, American Decisions 114. In this case the probate judge had drawn a will which was afterwards probated before him. Held that the judge was disqualified. The Court says: "It is one of the great principles of the common law, for which the people of England had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal."

Stockwell v. *Township,* 22 Mich. 341. Stockwell was moderator of a school district, and as such refused to pay

Porter for work done. Porter and other members of the school board ousted Stockwell as a moderator. Held that such action was illegal because of the maxim, "no one shall be a judge in his own cause."

State v. *Crane,* Collector, 36 N. J. L. 394. One of the commissioners of a township made an assessment for building a road. He owned property along the road. It was held that the assessment was invalid because of his interest. The Court quotes Hobart 87. The Court says, page 403: "The Chief Jusice, in Schroeder *v.* Ehlers, says 'that a person can not be a judge in his own case, has ever been regarded as one of the fundamental maxims of the laws of nature'; also 'that the injustice of allowing it is intuitive in the human mind. In my judgment the legislature is impotent to break down this great barrier to tyranny and fraud.'"

Stuart v. *Commonwealth,* 91 Va. 152, held that where a judge had approved a bond of a defaulting treasurer, he could not hear the suit on the default. The Court says, page 157: "We can not sanction a practice which could by possibility be drawn into a precedent, and which might or could render the judiciary of the State the objects of suspicion and of criticism, and tend to impair public confidence in their utter and complete disassociation from the subject matter of their official action."

Findley v. *Smith,* 42 W. Va. 299. Where a judge had assigned a claim which afterwards was part of a litigation before him, the judge became disqualified. The Court says, page 305: "And where there is a direct necessary interest, it matters not how remote the interest may be, or how small or insignificant in amount; the maxim (disqualification for interest) must be held sacred, and even the appearance of evil be avoided."

State v. *Seattle Board of Education,* 19 Wash. 8, 17, 40 L. R. A. 317. A trial for removal of a superintendent of public schools was held before a board. Defendant objected that one of the members of the board had said he would find defendant guilty. The Supreme Court held

that the trial was illegal. The Court says, page 17: "Actions of courts which disregard this safeguard (disqualification for interest) to litigants would more appropriately be termed the administration of injustice, and these proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. . . . Caesar demanded that his wife should not only be virtuous but beyond suspicion; and the state should not be any less exacting with is judicial officers."

Ex parte Cornwell, 144 Ala. 497. A man was tried for embezzlement before a judge who had been a depositor in the bank which had lost the money by the act of defendant. Held, the judge was disqualified. The Court says, on page 498: "The judge is human, and human nature at best is weak, and as far as it is possible a perfect equipoise should be always preserved in the administration of justice by the courts."

Yazoo R. R. v. *Kirk,* 102 Miss. 41. A trial was held before a judge whose son and brother-in-law were attorneys for one of the parties. The judge was held disqualified. The Court says, page 54: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence *aliunde* the record." The Court refers to the collection of cases in *Moses* v. *Julian,* reported in 84 Am. Dec. 114.

The Mayor who tried the instant case was financially interested in his decision as Mayor of his City and while it is not claimed in this case that M. J. Dugan was not a resident of the City of Xenia, yet the Mayor of the City of Xenia would have had a right to have brought in persons violating the liquor laws in other municipalities of the county, and in fact from any part of the county, under Section 6212-18 of the General Code of Ohio, and one-half of all the money collected from the fine in liquor cases is paid to the Treasurer of the municipality where the prosecution

is held (Section 6212-19 of the General Code), whereas in all other misdemeanor cases the municipality receives nothing.

Section 4270, General Code of Ohio, provides:

> "Except as otherwise provided by law all fines and forfeitures collected by him (the Mayor) in state cases together with all fees and expenses collected, which have been advanced out of the county treasury, shall be by him paid over to the county treasury on the first business day of each month."

So that, while as a matter of fact the Mayor may not have brought people in from other sections of the county to be tried before him, yet as a matter of law he had a right to do it. Further than that, while the Mayor was on a salary and was not paid in fees directly, yet in the cases where a conviction was had the costs were collected from the defendant and the said costs were paid into the fund out of which the salary of said Mayor was paid. (Section 8, City Charter, Xenia, Ohio.)

If no conviction was had, then no money would be paid into the salary fund of the Mayor. In other words, the Mayor could collect no fees to pay into his salary fund if the State failed. Sections 3016 and 3017 of the General Code of Ohio provides as follows:

Section 3016:

> "In felonies, when the defendant is convicted, the fees of the various magistrates and their officers, the witness fees and interpreter's fees shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto; in minor state cases, which have come to the court of common pleas through said magistrate's courts, the fees above enumerated shall be inserted in the judgment of conviction and when

collected the same shall be disbursed by the clerk of courts to the persons entitled thereto, except that in both felonies and minor state cases, said clerk shall pay the witness and interpreter's fees into the county treasury, monthly.

"In all cases when recognizances are taken, forfeited and collected, the amount recovered shall be paid into the county treasury, and if no conviction is had, such costs shall be paid by the county upon the allowance of the county auditor."

Section 3017:

"In all state cases any wholly salaried minor court officer charged with the execution of a warrant to arrest or order of commitment shall receive from the county treasury the actual necessary expense of executing such writs upon specifically itemized bills, verified by his oath, and certified to by the proper magistrate, court or clerk thereof, and in like manner such expense shall be paid from the municipal treasury when incurred in ordinance cases."

The Supreme Court of the State of Ohio in passing upon this case says that it is insisted that even though the Mayor was a salaried officer that it comes within the second of the conditions referred to by the Supreme Court in the *Tumey* case, viz., that the Mayor had in mind the financial needs of the city.

Upon this point the Court of Appeals in affirming the conviction said (R., 9):

"This reference, however, was in our judgment incidental and did not of itself amount to a disqualification of the mayor, but was a circumstance which accentuated the personal interest of the mayor under the scheme provided by the so-called Crabbe Act. To hold that the mayor of a city is disqualified merely because fines are paid into the city treasury would break down the legitimate functions of the non-commercialized

courts of the state. To so construe the decision of Judge Taft would affect the jurisdiction not only of mayors operating upon a fixed salary but municipal court judges, and might even extend to the common pleas and probate judges where the fines are paid into the county treasury. We are clear that this interpretation is not justified by the decision of the Supreme Court of the United States in the Tumey case."

Commenting on the above the Supreme Court of Ohio said (R., 9):

> "To these pertinent comments we may add that if we should adopt the arguments of counsel for accused persons in the cases recently submitted, it would result that a common pleas judge would be disqualified to sit in judgment upon a very large number of cases in the county of his residence, and in which he pays taxes, where taxes, assessments, licenses and franchises are involved, and where general property rights common to all property owners, including the judge, are involved."

Both the Court of Appeals and the Supreme Court of Ohio erred in their construction of the decision of this Court in the *Tumey* case. The error is in the failure to give cognizance to the fact that the Mayor is disqualified *not* "merely because fines are paid into the City Treasury", but because he is also a Commissioner of the City of Xenia, Ohio, and along with the other four members of the City Commission, controls the financial condition of the City. The analogy of a Mayor having no interest whatsoever in the financial affairs of a city beyond the payment to him of his salary, and that where payment of his salary is provided for by "the fees taxed and collected" and where he also has a vote as to the disposition of the fines which he imposes, needs no extended comment. The vice of the situation is seen at a glance. As was said by the Court in *Ex parte Cornwell, supra*, "The judge is human, and

human nature at best is weak, and as far as it is possible, a perfect equipoise should always be preserved in the administration of justice by the courts."

While the salary of the said Mayor is fixed by the City Commission, he being a member thereof, but not voting on the question of his own salary, the "possible temptation to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the State and the accused", is evidenced in the instant case in two distinct situations:

(1) That by continued convictions in cases of this kind, the Mayor could add large sums of money to the City Treasury, and particularly would the temptation manifest itself if revenue from other sources were not forthcoming sufficient to care for the needs of the City Government. And by reason of being a Commissioner, as well as Mayor, he could not divorce himself from knowledge of the financial condition of the City Treasury. Further, the continued convictions and imposition of heavy fines would not unlikely be rewarded by an increase in his salary; Section 8 of the Charter of Xenia, Ohio, permitting the Mayor to "receive such additional compensation as Commissioner as the Commission shall by ordinance determine upon the affirmative vote of three members thereof, exclusive of his own. . . ."

(2) That while the Mayor has no executive authority as Mayor, the moment he removes himself from the sphere of "judicial authority" he automatically becomes one of the five Commissioners comprising the City Commission, and as such is empowered to vote on the disposition of all moneys in the City Treasury, the only prohibition applying to him being the denial of a vote to increase his own salary. The temptation of the Mayor to overlook the niceties of judicial reasoning for the needs of the Commission stands out in bold relief. And it is to be noted that while the

amount of the fine to be imposed ranges from One Hundred Dollars to One Thousand Dollars, that the very maximum fine was imposed. The costs incurred amounted to $27.80, one-fifth of his monthly compensation. (R., 7.) "The fees taxed and collected by the said Mayor shall be paid into the City Treasury and credited to the fund out of which the salary of said Mayor shall be payable." Section 8, Charter of Xenia, Ohio.

We respectfully submit that the Supreme Court of the State of Ohio entirely missed the point in this case. We do not claim and never did claim that simply because the Mayor paid taxes and was a taxpayer in the city, that therefore he was interested in the outcome of the case. What we claimed then and what we claim now is that the said Mayor was interested in said prosecution by reason of his being Mayor of the City of Xenia; that his fees in case of conviction were paid into a salary fund and boosted the money out of which his salary would be paid; that he occupied two positions, one partisan and the other judicial, which were entirely inconsistent with each other.

CONCLUSION.

Defendant respectfully submits that the judgment of the Supreme Court of Ohio should be reversed for the reason that by such judgment the State of Ohio deprived the defendant of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that, first, under the statutes of Ohio and the circumstances of the case, the trial judge was interested financially as Mayor, in his decision; secondly, that he occupied two entirely inconsistent positions as a member of the City Commission and as Mayor, and that by reason thereof the defendant was denied due process of law in the trial of his case, and that the above

two matters necessarily resulted in an unfair trial before said Mayor.

Further, that the action of the Supreme Court of the State of Ohio is in direct violation of the law as laid down by this Court in the case of *Tumey* v. *Ohio, supra.*

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

F. L. Johnson,
Robert F. Cogswell,
Attorneys for Plaintiff in Error.

FILED
MAR 24 192

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 766

M. J. DUGAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO.

BRIEF OF DEFENDANT IN ERROR.

J. A. FINNEY,
HERMAN E. WERNER,
Counsel for Defendant in Error.

(33,218)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 766

M. J. DUGAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

Statement of Case.

On November 27, 1926, an affidavit was filed by the Chief of Police of the City of Xenia, Ohio, before the Mayor of said city, against M. J. Dugan, plaintiff in error herein, for the unlawful possession of intoxicating liquors, contrary to Section 6212-15 of the General Code of Ohio.

Upon a plea of "not guilty" said cause was heard on December 3, 1926. Before the introduction of any evi-

dence, "the defendant objected to the jurisdiction of the court and objected to the court hearing any evidence in the case on the ground that he is without jurisdiction to hear and determine the issues in this case." The objection was overruled and the defendant excepted. However, there was no reason assigned by the defendant in his objection to the jurisdiction of the court, nor was it claimed that the defendant was denied due process of law under the Fourteenth Amendment (R., 7-11).

In the Common Pleas Court the question of due process of law under the Fourteenth Amendment was not raised or mentioned in any way. The question of jurisdiction of the Mayor in that court was with reference to whether or not the Mayor, being elected as a City Commissioner, and as such, then appointed as Mayor, was in compliance with Section 10, Article 4, of the Constitution of Ohio, which provides as follows:

> "All judges, other than those provided for in this constitution, shall be elected, by the electors of the judicial district for which they may be created, but not for a longer term of office than five years."

The Common Pleas Court affirmed the Mayor's Court and error was prosecuted to the Court of Appeals of Greene County, Ohio, and on April 16, 1927, the Court of Appeals affirmed the Common Pleas Court. (Full text of opinion in appendix hereto.) This was the first time that the question of due process of law, as guaranteed by Section I of the Fourteenth Amendment to the Federal Constitution, was raised (R., 5-6).

The Supreme Court of Ohio heard and affirmed the Court of Appeals in the cause on error on December 21, 1927 (R., 8).

Statement of Facts.

The City of Xenia adopted a charter effected January 1, 1918.

The charter created a City Commission of five (5) members exercising legislative and, together with the manager, administrative powers of the city.

Charter, Section 7:

> "There is hereby created a Commission of five (5) members, having the qualifications hereinbefore provided for, who shall be elected at the first general election after the adoption of this charter who shall exercise all the powers, rights and authority now vested in and exercised by the City of Xenia and its several officers, or which may hereafter be granted to said city. All the powers exercised, or which may be exercised hereafter, by municipal corporations are hereby vested in said Commission, subject to the provisions of the Constitution of Ohio, and said Commission may provide by ordinance how any power shall be exercised."

The city manager is the administrative head of the municipal government.

Charter, Section 23:

> "The Commission shall appoint a city manager who shall be the administrative head of the municipal government under the direction and supervision of the Commission, and who

shall hold office at the pleasure of the Commission. He shall be appointed without regard to his political beliefs and need not be a resident of the city at the time of his appointment, but shall be a citizen of the United States. During the absence or disability of the manager the Commission may designate some properly qualified person to execute the functions of the office."

Charter, Section 24:

"The powers and duties of the manager shall be:

(*a*) To see that the laws and ordinances are enforced.

(*b*) Except as herein provided, to appoint and remove all heads of departments and all subordinate officers and employees of the city; the appointments to be upon merit and fitness alone, and in the classified service all appointments and removals to be subject to the civil service provisions of this charter.

(*c*) To exercise control over all departments and divisions created herein, or that may hereafter be created by the Commission.

(*d*) To see that all terms and conditions imposed in favor of the City, or its inhabitants, in any public utility franchise are faithfully kept and performed, and upon knowledge of any violation thereof to call the same to the attention of the solicitor who is hereby required to take such steps as are necessary to enforce the same.

(*e*) To attend all meetings of the Commission, except which his removal is under discussion, with the right to take part in the discussion but having no vote.

(*f*) To recommend to the Commission for adoption such measures as he may deem necessary or expedient.

(*g*) To act as budget commissioner and to keep the Commission fully advised as to the financial conditions and needs of the city.

(*h*) To perform such other duties as may be prescribed by this charter or be required of him by ordinance or resolution of the Commission."

Mayor of the City.

The mayor of the city of Xenia is one of the members of the City Commission, exercising as mayor only judicial functions. He receives no fees, but a fixed salary only, "upon the affirmative vote of three members of the Commission, exclusive of his own."

Charter, Section 8:

> "The Commission shall designate by a majority vote one of its number to act as mayor of the city who shall exercise all the judicial functions of a mayor under the general laws of the State and who shall use the title of "Mayor" in any case in which the execution of legal instruments of writing or other necessity arising from, and which the general law of the State so requires, but this shall not be construed as conferring upon him the veto power or the administrative functions of a mayor under the

general laws of the State. He shall receive such additional compensation to that received as commissioner as the commission shall by ordinance determine, upon the affirmative vote of three members thereof, exclusive of his own, and shall hold said office at its pleasure. Such mayor shall give bond in an amount as fixed by the Commission. The fees taxed and collected by said mayor shall be paid into the city treasury and credited to the fund out of which the salary of said mayor shall be payable.

"That Section 29 and original Section 8, of the charter be repealed.

"Amended by ordinance September 4, 1925, and election held November 3, 1925."

Ordinance No. 302, fixing the salary and bond of the mayor:

"SECTION 1. That from and after June 1, 1926, and until otherwise provided for, the mayor of the city of Xenia, Ohio, shall receive a salary of $1,200 per annum, payable monthly. Said salary shall be paid out of the funds to which fees, taxed and collected by said mayor, are credited. Said salary shall be in lieu of any and all such fees, but shall be in addition to the salary received by him as city commissioner."

Under the general laws of the State any fees that might arise from the Mayor's court must be paid into the general fund of the city, and the Mayor's salary, as well as all other and general expenditures of the city, is paid out of that fund. The levy for taxes from the general tax duplicate for all current expenses of

the city are levied as one item and paid into one fund. The Mayor's salary is in no wise dependent upon what fees do or do not go into the general fund (General Code 5625-3-4-9-10).

The manager is charged with the responsibility of attending to the finances of the city, and upon his recommendation the appropriations for the ensuing year are approved by the city commission after a public hearing thereon.

Charter, Section 35:

> "The fiscal year shall begin January first. On or before November first of each year the manager shall submit to the Commission an estimate of the amount of money needed for the ensuing year, which information shall be compiled and based upon the following facts:
>
> First. A detailed statement of the expenditures of each department for that year.
>
> Second. A detailed statement of the expenses thereof for the two preceding years.
>
> Third. A detailed statement of the monthly expenditures from each fund for the twelve months next preceding.
>
> Fourth. A statement showing the unexpended balance in each fund at the time of making the estimate.
>
> Fifth. Such other information as may be required by the Commission.
>
> "Upon receipt and examination of such estimate the Commission shall prepare an appropriation ordinance, after giving notice of a time

> for public hearing thereon, and the same shall not be passed until ten (10) days after such public hearing. The expenditures during the ensuing year shall be made within such appropriation."

The defendant was a resident of, and the offense charged was committed in, the corporate limits of the City of Xenia (R., 2).

ARGUMENT.

It is urged by the defendant, *first*, that the trial judge was interested financially as mayor, and *second*, that he occupied two entirely inconsistent positions as a member of the City Commission and as mayor, and that by reason thereof the defendant was denied due process of law in the trial of his case, and in support of these two propositions he relies upon the opinion of this Court rendered March 7, 1927, in the case of Tumey, plaintiff in error, *vs.* The State of Ohio, defendant in error, 273 U. S., 510.

The Tumey Case Distinguished.

It occurs to us that an attempt to draw an analogy between the present case and the Tumey case requires the wildest stretch of imagination. The court will recall in the Tumey case the record discloses that the question of denial of due process of law, as guaranteed in the Fourteenth Amendment, was raised by a motion at the beginning of the hearing on that specific ground, and also the record discloses every element of a so-called commercialized court. The mayor had made

statements showing his bias. The offense was committed beyond the corporate limits of the village. An ordinance putting in motion the necessary machinery to maintain such a court, provided that a per centum of the fines received should go to officers and attorneys, and the mayor was to receive fees in addition to his salary, and that he had stated, "if the village didn't need any money he is against it and if the village finances needs it he will run it"; it was also testified that the village was "broke all the time."

The mayor of the village of North College Hill was such by virtue of the Federal form of government, empowering and charging the mayor with the dual functions of an administrative as well as a judicial officer. That the fines and fees under such a so-called court amounted to a large and substantial sum out of all proportions to the size of the village.

The record in the Tumey case bore out the contention of the defendant, that the court was run for the expressed and avowed purpose of making money, and this Court well said that a trial before such a court was a denial of a trial by due process of law, as guaranteed by the Constitution of the United States.

The record in the present case readily distinguishes it from the Tumey case. The defendant, Dugan, was a resident of, and the offense was committed within, the corporate limits of the City of Xenia. The mayor was exercising the functions of a judicial officer on a fixed salary, which did not depend upon the conviction or acquittal of anyone. He received no fees whatsoever.

The record does not disclose and, in fact, there was none of the elements of a commercialized court present in the trial of this defendant. In fact the defendant never claimed that he was denied due process of law until after this case reached the court of appeals on error.

There is no ordinance in the City of Xenia providing that a per centum of all liquor fines shall go to officers or attorneys.

The record does not disclose and in fact the City of Xenia is not in financial straits. The court functions solely for the purpose of curbing vice and crime within its limits.

The responsibility of the administration of the affairs of the city, as well as its financial needs, is upon the manager and not the mayor. His sole interest in that connection is that of one of five (5) commissioners, three (3) of whom are a quorum to transact business. He is specifically denied a vote on the fixing of his own salary.

It is urged by the defendant even under the conditions appearing in the agreed statement of facts, that the interest of the mayor, as one of the five (5) commissioners, is such as to disqualify him, and to deny the defendant a trial by due process of law. And the fact that the mayor is a commissioner brings him within the prohibition as laid down by this Court in the Tumey case.

This bold and sweeping interpretation of the court's opinion in the Tumey case goes beyond the real reason and import of that decision. And such a view or hold-

ing could only lead to an absurd application thereof and would cause not only the Mayor's Court of the City of Xenia but also the Municipal or Police Courts, Probate and Common Pleas Courts to fall within the prohibition of that case.

In the case of *In re* Guerrero, 69 Cal., 88, we have a similar state of facts. The defendant was charged with carrying on the business of keeping a place where intoxicating liquors are sold without procuring a license. The mayor and council were granted power by the city charter to license the carrying on of trades and other business. The violation of any ordinance authorized by the act was a misdemeanor by virtue of the charter. The mayor presided over the council that passed the ordinance. The mayor also acted as the court in trying the accused.

The court said, page 100:

> "The fact that the same person officiated as mayor, and, as mayor presided in the local legislative body which passed the ordinance, did not divest him of his authority under the charter to act as the judicial officer of the court. The provisions of the charter which made the mayor of the city a component part of the council and '*ex officio* city judge' are not in conflict with the constitution." See Uridias *vs.* Morrell, 22 Cal., 474.

On page 101 the court further says:

> "His (the mayor's) qualification to act was challenged by an affidavit, made and filed by the defendant, which contained a statement of de-

> fendant's belief that he could not have a fair and impartial trial in the city court on account of the prejudice and bias of the judge who as judge of the court and mayor of the city, was the subject of much acrimonious discussion by the newspapers and persons within the municipality, in connection with the passage of the ordinance and in consequence thereof 'the said mayor and judge is interested in the result of the trial and is interested in convicting affiant.' It is also urged that as Section 12, Article 5 of the charter provides that 'all fines collected in said city court shall be paid by the said judge into the city treasury and be placed to the credit of the salary fund,' and as subdivision 1, Section 2, Article II of the charter provides that the mayor of the city shall receive a monthly salary of $150, the mayor, as *ex officio* city judge, was interested in convicting the petitioner of violating the ordinance. It is difficult to see how this provision of the charter made the judge of the court, personally or pecuniarily interested in a criminal action for violating an ordinance so as to incapacitate him from trying it and from enforcing conviction by the collection of a municipal fine or imprisonment."

In commenting upon this case this Court in the Tumey decision made the following comment:

> "In *ex parte* Guerrero, 69 Cal., 88. The judge was paid a regular salary fixed by law. The fund out of which this was paid was increased by fees and fines collected in his court, but there is no evidence that payment of his salary was dependent upon the amount of his collections or convictions."

Discretion of Judge in Amount of Fines.

It is urged by the defendant that by reason of the court's discretion in assessing fines for a first offense from one hundred dollars ($100), to one thousand dollars ($1,000), and for the second offense from three hundred dollars ($300), to three thousand dollars ($3,000), under Section 6212-17 of the General Code of Ohio, the defendant was deprived of liberty and property without due process of law.

The fine in this case was one thousand dollars ($1,000), which was not an abuse of the discretion granted by the statute when we bear in mind that this was actually a second offense, the defendant admitting upon the stand that he had plead guilty to a similar charge in the Xenia court in February, 1924, and was fined four hundred dollars ($400) (R., 13).

Financial Interest of Mayor.

It is insisted by the defendant that the interest of the mayor as a member of the city commission is what he terms a financial interest sufficient to disqualify him in his judicial capacity. Whatever interest as such he may have is so slight and so remote as to fall within the rule as laid down by Mr. Justice Cooley in his Constitutional Limitations, 7th Edition, page 594, in which he says, where "interest is so remote, trifling and insignificant that it may be fairly supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual. And where penalties are imposed, to be recovered only in a municipal court, the

judge and jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest."

In the case of State *vs.* Intoxicating Liquors, 54 Maine, 564, it was urged by the defendant, as does the defendant in this case, that a disregard of even a remote, minute, or even contingent interest cannot be tolerated, and must forever prevent the people, through their constitutional organ, to allow any judge to sit or act where such a remote interest can be traced.

On page 568, the court said:

> "This argument, if carried out to all its logical results, would prevent the imposition of any fine to and for the use of the State, by any magistrate in it, whether a justice of the peace or a judge of the Supreme Court. For all are citizens of the State and pay taxes, and have an interest in having the treasury supplied by penalties and fines,—in the same manner as a judge of a Police Court of a city has in replenishing the city treasury by like means."

Chief Justice Shaw in the case of Commonwealth *vs.* Emery, 11 Cushing, 411, in commenting upon the power of the legislature to give jurisdiction notwithstanding an interest, said:

> "We may go further and add, that, it being quite competent for the legislature to provide, as they have in many cases, that such a municipal minute interest, shall not disqualify a judge, juror, appraiser or other similar officer, when a jurisdiction is given to a magistrate, who,

> by force of the same act, may have some remote municipal interest, it was their intention to remove such disqualification."

The defendant urges that it is sufficient to disqualify the Mayor if he has any interest, whether that interest be great or small, or whether that interest be personal or official, and cites a number of cases which he contends supports that proposition. (Page 7.) These cases are taken up in order and we comment upon them as follows:

Pierson *vs.* Atwood, 13th Mass., 324: This case arose on a charge of violation of the Sabbath, before a Justice, and against a non-resident of the township, which township would have received all of the fine and had it been tried in another township such township would not have received the fine.

Gregory *vs.* Railroad, 4th Ohio State, 675: Two of the judges appointing appraisers to fix damages against the Railroad for land appropriated were stockholders in the Railroad Company. They had a direct, personal, and substantial pecuniary interest.

State *vs.* Young, 31 Florida, 594: Under the act of incorporation of the church the vestrymen were invested with any property of the church. The judge was a vestryman and hence would be disqualified under the Florida statute, R. S., 967, that a judge of any court should not sit in any cause to which he is a party or in which he is interested.

Dimes *vs.* Grand Junction Canal, 3 H. L., 759: The Lord Chancellor was a shareholder in a company which had filed a bill in equity before him against a landowner, hence there was a personal interest.

Moses *vs.* Julian, 45 N. H., 52: The judge before whom a will had been probated had written the will and acted as advisor to the testator.

Stockwell *vs.* Township, 22 Mich., 341: The plaintiff in error refused to approve a bill for one of the commissioners hearing the ouster proceedings. He would have benefited personally and directly by a favorable action of the commissioners.

State *vs.* Crane, collector, 36 N. J. L., 394: A road was laid out by the road commissioners along land owned by one of them which was benefited by it. The fifth syllabus is as follows:

> "Disqualifications by reason of interests that are common to all taxpayers may be removed by the legislature, but the legislature has not the power where the interest is peculiar and direct to authorize an interested Commissioner to decide his own cause," etc.

Stuart *vs.* Commonwealth, 91 Va., 152: The judge as an attorney in fact for another party signed that party's name to the bond which the judge himself had to approve in a transaction made before his court and so had to pass upon his own credentials as attorney.

Findley *vs.* Smith, 42 W. Va., 299: The judge was assignor of a judgment previously assigned to him, to enforce the lien of which against the real estate of the present assignee suit is now brought before the judge.

State *vs.* Seattle Board of Education, 19 Wash., 8: A member of the Board who had filed charges against a school superintendent had declared no matter what the evidence he would vote against the superintendent. There was no appeal from the decision of the Board.

Ex parte Cornwell, 144 Ala., 497: The defendant was charged with embezzlement of a bank in which the judge, claiming the right to hear the case, was a depositor.

Yazoo R. R. *vs.* Kirk, 102 Miss., 41: A son and brother-in-law of the judge were attorneys for the plaintiff in error.

In all of the foregoing cases there is presented a personal interest of the court either from bias, personal gain, party to suit, or kinship.

Application of Law in Case and Not Possibilities to Govern.

It is further claimed that although the defendant, Dugan, was a resident of the city and the offense charged was committed within the corporate limits of the city, yet by reason of the fact under the law the mayor would have had the right to have brought in persons violating the liquor laws in other municipals of the county, this, of itself, was sufficient to disqualify him (page 10).

A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. "His right is limited solely to the inquiry whether in the case which he represents the effect of applying the statute is to deprive him of a constitutional right."

Castillo *vs.* McConnico, 168 U. S., 680.

Straus *vs.* Foxworth, 231 U. S., 162.

New Orleans *vs.* Water Works Company, 142 U. S., 88.

Funds Into Which Fees and Fines are Paid.

It is finally urged that the fees, in case of conviction, are paid into a salary fund and boosted the money out of which the mayor's salary is paid.

As pointed out in our statement of facts, each subdivision of the State (meaning any county, school district, municipality, corporation, or township), G. C. 5625-1, is required to establish, first, a general fund from which any expenditures for current expenses of any kind may be made, G. C. 5625-5-9, and also sinking funds and other special funds for bond retirement, special improvements, etc.

The fees and fines collected in the City of Xenia, are paid into the general fund.

Section 12375 of the General Code provides:

> "That in all sentences in criminal cases, including violations of ordinances, the judge or magistrate may include therein and render a judgment against the defendant for the costs of prosecution."

And Section 12378 of the General Code provides as follows:

> "Unless otherwise required by law an officer who collects a fine shall pay it into the treasury of the county in which said fine was assessed, to the credit of the County General Fund, within twenty (20) days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the County Auditor."

G. C. 6212-19, is as follows:

> "Money arising from fines and forfeited bonds shall be paid one-half into the State treasury, credited to the General Revenue Fund, one-half into the treasury of the township, municipality or county where the prosecution is held according as to whether the officer hearing the case is a township, municipal, or county officer."
>
> Barth *vs.* State, 107 O. S., 154, 140 N. E., 650.

If the argument of the defendant in this matter has any weight it would apply with equal force to cases prosecuted before the Probate Court or the Court of Common Pleas of the county, or to police courts in such municipalities as have a police court created by special enactment of the Legislature, for such judges are paid from the general fund of their respective subdivisions.

Objection of Defendant to Jurisdiction Not Sufficient.

Objection was made at the outset to the jurisdiction of the Mayor of the City of Xenia, Ohio, to hear the case, but no grounds were stated for the claimed want of jurisdiction (R., 11). Nothing was set out in the objection as to any interest disqualifying the mayor to hear the case, consequently no constitutional question was raised, for to do so the particular constitutional question must be pointed out as well as the particular provision of the constitution alleged to be violated, and the failure to do so, in so far as any con-

stitutional right and due process of law is concerned, is the same as if no objection had been made. The question of jurisdiction goes either to the subject-matter or to the person.

It is well settled that if the question of jurisdiction is one of subject-matter then the question can be raised at any time in the trial court or on error, for if the court does not have jurisdiction of the subject-matter, consent or waiver cannot give the court such jurisdiction.

On the other hand, if the question is one of jurisdiction of the person then such question must be raised at the earliest opportunity, and if not raised at that time then the question is regarded as waived and comes too late if not made until the person has without objection submitted himself to the jurisdiction of the court. The question must be seasonably and definitely raised at the earliest opportunity.

It is not claimed that the Mayor of the City of Xenia did not have jurisdiction over the subject-matter.

The claim is that the defendant was denied due process of law by reason of the operation of the statutes as participated in by the mayor as a partisan executive and as a judicial officer. That this constitutional right may be waived was fully recognized by this Court in the Tumey case. At page 445 we quote from the opinion:

> "He seasonably raised the objection, and was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome,

> and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification."

And further quoting at page 437:

> "Evidence clearly showing that defendant was guilty and the fact that he was assessed minimum fine held not to preclude complaint that he was denied due process of law, in violation of Const. U. S. Amend. 14, such objection having been properly made at outset of trial."

Thus it is seen that the court considered that "He seasonably raised the objection," and that the court further remarks, "There were thus presented at the outset both features of the disqualification." And, further, the right to complain was conditioned on "such objection having been properly made at outset of trial."

The remaining question is, Was the objection of the defendant in this case properly made at the outset of the trial? We contend that it was not, and in fact the question now before this Court was not raised until the case reached the court of appeals.

Haun *vs.* State, 183 Ind., 153; 108 N. E., 519:

> "Syllabus 3. When the constitutionality of a statute is attacked, but appellants' brief does not disclose the particular constitutional provision with which it is claimed to be in conflict, the court is not warranted in making an independent search of the Constitution to discover a cause for holding the act invalid."

Crowley *vs.* State, 11 Ore., 512; 6 Pac., 70:

> "Syllabus: A statute will not be declared void, in whole or in part, unless its validity is distinctly pointed out and made clearly manifest. The general rule is that every intendment must be given in its favor."

Northumberland County *vs.* Zimmerman, 75 Pa. St., 26, at page 32, the court said:

> "That the powers confided to the governor to appoint these officers (special peace officers) and to determine their compensation might be abused is not a valid argument against the powers themselves. To invalidate them some clause of the constitution must be pointed out with which they conflict: and this the learned counsel for the plaintiff in error has failed to do."

Zimmerman *vs.* Bank, 113 Ohio State, 703:

The petition in error in this case was dismissed by the court "for the reason no debatable constitutional question is involved in this cause, and the alleged constitutional question was not presented to or passed upon by the court of appeals."

Polytinsky vs. Johnston, Ala., 99 S. 839.

Request for affirmative charge is an insufficient method of presenting a constitutional question.

First National Bank *vs.* Foster, 271 S. W., 536.
Hughes *vs.* State, 238 S. W., 538.

Conclusion.

The State respectfully submits that it is a far cry between commercialized courts and the mayor's court of the city of Xenia, Ohio.

That the said court is in the same category as special police courts, probate courts, and courts of common pleas throughout the State of Ohio.

That the interest of the mayor in the outcome of a criminal prosecution is no different than in these other courts.

That the question of jurisdiction was not sufficiently and seasonably raised.

That the defendant was tried by due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

That the circumstances and the record in this case do not show any transgression or violation of the defendant's constitutional rights.

That the mayor had no financial interest in the outcome of the prosecution, and that his position as a member of the City Commission does not carry with it any financial interest or responsibility other than is common to any Police Court judge, probate judge, or judge of the Common Pleas Court, in the State of Ohio, and that the judgment of the State courts should be affirmed.

Respectfully submitted,

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